IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 2.2.2006

CORAM:

THE HONOURABLE MR.JUSTICE P.K.MISRA
AND
THE HONOURABLE MR.JUSTICE R.SUDHAKAR

W.P.No.46447 of 2002

1.The Secretary to Government,
Tamil Development, Culture and
Religious Endowments Department,
Fort St.George,
Chennai-600 009.

2.The Special Commissioner,
and Commissioner,
Hindu Religious and Charitable Endowments Administration
Department,
Uthamar Gandhi Salai,
Chennai-600 034. .. Petitioners

vs.

1.M.Pugalendran

2.The Registrar,
Tamil Nadu Administrative Tribunal,
Chennai-104. .. Respondents

Writ Petition filed under Article 226 of the Constitution of India, praying for issuance of a writ of certiorari, to call for the records relating to the orders passed by the Tamil Nadu Administrative Tribunal at Chennai made on 11.7.2002 in Original Application No.4755 of 1997 and to quash the same.

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For petitioners : Mr.G.Sugumaran
for Special Govt. Pleader (HR & CE)

For respondents: Mr.Veera Kathiravan for R-1
R2 - Tribunal

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ORDER

(The Order of the Court was made by P.K.Misra,J.)

Heard learned counsel appearing for the parties. The present respondent No.1 had filed O.A.No.4755 of 1997 before the Administrative Tribunal seeking for promotion to the post of Assistant Commissioner (H.R.& C.E.) with effect from the date his junior was promoted as Assistant Commissioner.

2. The allegation of the applicant was to the effect that even though he was senior to such person, at the time of considering the question of promotion, the case of the applicant was ignored and he was denied promotion and only subsequently, he was promoted in the year 1996. The prayer before the Tribunal was to the following effect:

> "It is prayed that this Hon'ble Tribunal may be pleased to call for the records in G.O.Ms.No.217, Commercial Taxes and Religious Endowments Department, dated 18.6.1996 passed by the 1st respondent herein and direct the respondents herein to refix the seniority of the applicant and keep his name over and above his juniors and thus render justice."

The basic allegation is to the effect that under the proceedings dated 18.6.1996, two of the juniors in the Department in which he was functioning as Executive Officer in the H.R. & C.E. had been promoted and the applicant was promoted only subsequently by order dated 4.10.1996.

3. The stand of the Department in such O.A. was to the effect that as a matter of fact, when the question of promotion for the year 1994-95 was considered, the applicant had been punished in the departmental proceeding and penalty of stoppage of two increments without cumulative effect had been imposed. It was also indicated that at the time when the panel was supposed to be prepared, at that stage, departmental proceeding was pending and charges had been framed. Therefore, the Department placed reliance upon G.O.Ms.No.368, dated 18.10.1993 and had submitted that the denial of promotion was justified on account of the aforesaid facts.

4. The Tribunal however allowed the application of the present respondent No.1 by referring Rule 39(d) of the Tamil Nadu State and Subordinate Service Rules (hereinafter referred to as 'the Rules'). The Tribunal observed that G.O.Ms.No.368

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being an administrative instruction, cannot over-ride the provisions contained in the statutory rules and therefore, cannot be given preference. The Tribunal further observed that the applicant should have been given promotion keeping in view the provisions contained in Rule 39(d) of the Rules. The said order passed by the Tribunal has been challenged by the State Government and the H.R. & C.E. Department.

5. Having heard the learned counsels appearing for both parties and having gone through the order passed by the Tribunal and the relevant G.O., we are unable to sustain the order passed by the Tribunal.

6. Rule 39 is a provision relating to temporary promotion. Even though the Tribunal has placed reliance upon Rule 39(d) alone, we feel, for proper interpretation of the Rules, it is necessary to extract Rule 39(a), (c) and (d):

> "Rule 39: Temporary promotion: (a) (i) where it is necessary in the public interest owing to an emergency which has arisen to fill immediately a vacancy in a post borne on the cadre of a higher category in a service to class by promotion from lower category and there would be undue delay in making such promotion in accordance with the rules, the appointing authority may temporarily promote a person, otherwise than in accordance with the rules.
>
> (ii) No person who does not possess the qualification, if any prescribed for the said service, class or category shall ordinarily be, promoted under clause (i). Every person who does not possess such qualification and who has been or is promoted under clause (i) shall be replaced as soon as possible promoting a person possessing such qualifications.
>
> (c) A person temporarily promoted under clause (i) of sub-rule (a), shall, whether or not he possess the qualification prescribed for the service, class or category to which he is promoted be replaced as soon as possible by the member of the service who is entitled to the promotion under the rules.
>
> (d) Where is necessary to promote an officer against whom an enquiry into allegations of corruption or misconduct is pending the appointing authority may promote him temporarily pending enquiry into the charges against him. The competent

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authority shall have discretion to make regular promotion in suitable cases."

7. In our considered opinion, all these provisions of Rule 39 must be read together. The provisions relating to temporary promotion has been incorporated in the Rules, obviously, with a view to tide over any emergency to fill up immediately any vacancy in a post. At the time of filling up of any post by temporary promotion, the Department may not be armed with the particulars of all officers eligible for such promotion and in the exigency of administrative requirement, some persons may be immediately promoted, so that, there is no disruption in the functioning of the higher post. In fact, as per Rule 39(c), such person will continue to hold the higher post till a member of the service is regularly promoted. Rule 39(d) is only an extension of the principles of Rule 39(a) and 39(c) and under Rule 39(d), while considering the question of filling of the promotional post temporarily, the officer against whom the departmental proceeding is pending, may also be considered for temporary promotion. However, Rule 39(d) does not confer any right on any person to be temporarily promoted. The question whether the post shall be filled up temporarily by promotion is obviously a matter of discretion by the higher authority. Therefore, in our opinion, the reliance placed by the Tribunal on Rule 39(d) is misconceived.

8. The counsel for the petitioners has placed reliance upon G.O.368 and submitted that since the departmental proceedings had been initiated and charges have been framed, in view of paragraph (iv) as well as (vi) of such Government Order, the case of the respondent No.1 had been rightly ignored, while considering the case of promotion for the year year 1994-95. It is necessary to point out that even though the actual order was passed in 1996, it related to promotion for the year 1994-95. At that stage, obviously, the present respondent No.1 had been punished in departmental proceeding.

9. To get over this hurdle, the counsel for the respondent No.1 submitted that such G.O. was issued only with effect from 18.10.1993, whereas, the panel for the promotion was required to be prepared on 1.10.1993. It is therefore submitted that since the G.O. is prospective in operation, the direction in the G.O. could not have been utilised for the purpose of denying promotion.

We are unable to accept such submission made by learned counsel for the respondent No.1. Even assuming that G.O. is prospective, the fact remains that question of promotion was for the year 1994- 95. Even assuming that the name of the

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present respondent No.1 is to be included in the panel on 1.10.1993, that would not have given him the right of being promoted in 1994-95, because, by then, the G.O. was already in force. The G.O. categorically stated in Clause (5) that a person against whom charges have been framed, would not be entitled to be promoted even if his name is included in the panel. In the aforesaid view of the matter, we are unable to sustain the order passed by the Tribunal and the writ petition is to be allowed.

10. In course of hearing, learned counsel for the respondent No.1 also submitted that even though the respondent No.1 was denied promotion on the basis of punishment in departmental proceeding, subsequently, he has been promoted, but his seniority has been fixed below the persons who were junior to him in the grade of executive officer and therefore, this amounts to double punishment.

Law is well settled that merely because a person is denied promotion on account of any earlier punishment and becoming junior consequently it cannot be construed as double punishment for a single delinquency. The question of seniority of a person would obviously depend on the date of promotion. If a person is promoted earlier, a person who is promoted later, cannot be treated as senior, unless the rules specifically so indicate. In such view of the matter, the respondent No.1 cannot say that he must be treated as senior to the other person nor can he say that his lower seniority in the promotional post, amounts to a double punishment. It is also important to indicate that before the Tribunal, the persons above whom the present respondent No.1 is claiming seniority, had not been impleaded as parties and therefore, no order can be passed adversely affecting such persons. It is also to be noticed that even though the G.O. regarding their appointment was challenged, such persons were not impleaded as parties. This aspect has been lost sight of by the Tribunal. In the absence of these parties, the Tribunal could not have decided about the seniority of the present respondent No.1 above those persons.

11. For the aforesaid reasons, the writ petition is allowed. The order passed by the Tribunal is quashed. No costs.

cs

Sd/
Asst.Registrar

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Sub Asst.Registrar

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To

1. The Secretary to Government,
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2. The Special Commissioner,
     and Commissioner,
   Hindu Religious and Charitable Endowments Administration
     Department,
   Uthamar Gandhi Salai, Chennai-600 034.

3. The Registrar,
   Tamil Nadu Administrative Tribunal,
   Chennai-104.

+ one cc to Mr.Veera Kathiravan,Advocate Sr.No.4463.
+ one cc to the Government Pleader Sr.No.4411.

NTK (CO)
RSM/01/03/2006

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